

layer including solid pieces in gravy and an upper layer comprising a substantially solid food stuff capable of supporting the base layer when the pet food is inverted. Independent Claim 10 claims a process comprising filling a base layer of solid food pieces in a gravy and filling an upper layer into the can, wherein each of the base layer and upper layer has a viscosity falling within a specific range. In the claimed invention, the layers are structured and ordered so that when an open can is tipped to release the contents, the contents emerge in their entirety. The solid layer is designed to emerge first and settles in the dish. The emergence of the solid layer is encouraged by the fluidity of the lower layer of chunks and the gravy behind it. The gravy and chunks then follow to form a layer on top of the solid layer, possibly spilling down its sides. This layer is inherently more stable and reduces the risk of creating a mess upon opening the can.

Applicants respectfully submit that the obviousness rejection is based on an improper application of the law to the facts. For example, with respect to independent Claim 1, none of these references, either alone, or in combination, suggests a canned pet food having an upper layer which provides support to a gravy and food piece base layer upon inversion of the can. This is a specific limitation of Claim 1 that is neither disclosed nor suggested.

The principal reference relied upon by the Office Action is *Ohba*. *Ohba* fails to disclose or suggest the ability of the upper layer, on inversion, to support the base layer. Nor does *Ohba* disclose or suggest that the base layer, before inversion, includes solid food pieces in gravy. *Ohba* only teaches that different food varieties having substantially the same structural characteristics should be included in the can. This is in contrast to the present invention, which provides layers having clearly distinguishable compositions and textures. Thus, *Ohba* is only concerned that the order in which the food is eaten by the pet is varied (see column 2, lines 16-22). If anything, *Ohba* teaches away from the claimed invention in that it is not desirable to have

an upper and base layer as in the claimed invention as this reduces the capacity to vary the order of layers for the pets. *Ohba* does not disclose nor suggest the base layer and upper layer as specifically claimed in Claims 1-10.

Applicants note that the claimed invention is not merely a chunk and gravy product. Rather, it is a product that maintains its structural integrity as well as separation of one product phase from another. The claimed invention allows the consumer to tip the can over allowing the product to maintain its structural integrity. For example, if the layers were reversed, in tipping out the contents by the consumer, the chunks and the gravy would emerge first. The solid layer would then follow and would thereby attempt to be perched on top of the loose chunks. This would provide an inherently unstable product with unpredictable results. Not only would the resultant product not be appealing as in the claimed invention, it is also easy to imagine that the solid layer would remain in the bottom of the can upon the can being inverted. Therefore, it may be necessary to dig out the product with a spoon, fork, or other implement.

In part, to remedy the deficiencies of *Ohba*, the Patent Office states that Applicants have admitted that it is known to have solid meatloaf products and chunk-type products. This appears, in part, to form the basis for the proposed modification of *Ohba*. However, as Applicants set forth in their patent application, such products are meatloaf products that encase the chunk product. They are not separate layers as in the present invention. Moreover, the Patent Office fails to address the importance of the gravy which accompanies the chunks. The gravy contains fat which provides nutrients, moisture and palatability, which is a feature not disclosed in Applicants' admissions or *Ohba*. Accordingly, the citation to this alleged admission of prior art does not remedy the deficiencies of *Ohba*. Modifying *Ohba* based on the alleged admission of prior art would not result in a multi-layer product having specifically textured layers which serve

distinct functions. Indeed, modifying *Ohba* based on the alleged admissions would teach away from the claimed invention.

Nor does *Poppel* remedy the deficiencies of *Ohba* and the alleged admissions. *Poppel* relates to formulated emulsion products in a loaf-like form for consumption by animals. The product is a coagulated meat emulsion. The aim of the product is to make a loaf-like emulsion product with a relatively high moisture content and form it into chunks. To improve viscosity in the face of increased moisture content, alkaline is added. The chunks may be combined with an emulsion to form a chunk in loaf product. This is similar to what is described in Applicants' background of the invention.

There is no suggestion in *Poppel* to keep the gravy separate from the chunks. Nor is there any suggestion in *Poppel* that the loaf should be combined with gravy and chunks. *Poppel* does not provide separate layers. Thus, the combination of *Poppel*, *Ohba*, and the alleged admission of prior art still does not provide a pet food product having separate layers, one upper one lower. It still does not provide that the lower layer has gravy and chunks. It still does not provide a pet food product having an upper layer that is solid on top of a lower layer that includes gravy. It still does not provide a solid layer that can support the previously lower layer upon inversion. It still does not provide a product that can be dispensed from the container to serve a meal. Thus, even after the Patent Office combines the three principal references, they still failed to even arguably suggest many elements of the claimed invention. In fact, if anything, these references teach away from the claimed two layer structure.

The remaining references do not remedy the deficiencies of the three principal references set forth above.

With respect to the *Quaker* reference, *Quaker* does not provide any layered structure at all. Although it teaches the manufacture of a two phase product, neither phase comprises individual solid chunks in a substantially flowable medium. Indeed, in *Quaker*, one of the phases is completely surrounded by the other phase. This is set forth as being an essential feature of *Quaker*. This, therefore would direct one skilled in the art away from the claimed invention.

The *McMahon* reference does not deal with pet foods. Although it contemplates meat-based products, it provides a product wherein each can provides several identical servings though they have a vertical separation of components. In contrast to the claimed invention, *McMahon* is not concerned with a single serving having a specifically desired structure. Instead, *McMahon* provides a two-phase food product wherein the phases are separated along a substantial axial interface in the can. Thus, *McMahon* is not concerned with issues that are created by a horizontally layered structure that is designed so that its contents are dispensed into a dish or other container. In contrast to the claimed invention, which is designed to be inverted into a dish and maintain it's attractive appearance, *McMahon* is satisfied with an attractive appearance only at the time the can is opened. See page 2, line 61 to page 3, line 5. Instead of inverting and dumping the can into a dish, in *McMahon* the concern is with spooning out the phases in a uniform manner. See page 2, lines 62-64. Thus, *McMahon* is not concerned with maintaining a vertically based configuration upon inverting the can.

Although *McMahon* may state that one phase can contain fruit chunks in a sauce, this does not address the issue of how to dispense the product so the chunks lie on top of an underlying solid phase. *McMahon* does not evidence that phases may vary as desired. In fact, *McMahon* discloses to one skilled in the art that careful consideration has to be given to the various parameters and properties of the phases to avoid undesirable consequences such as

intermixing. Further, vertically oriented separated phases do not address or suggest the issues that apply to horizontal interfaces. In this regard, gravitational effects must be considered with respect to horizontal interfaces as opposed to the vertical interfaces of *McMahon*. *McMahon* does not even suggest how these issues should be dealt with.

Hillebrand, similar to *McMahon* is concerned with the appearance of the product in the container and not with the appearance of the contents when they are emptied from the container. *Hillebrand* is not concerned with a product that is dispensed into one complete meal. Therefore, *Hillebrand* is not concerned with the inversion of the can but, again similar to *McMahon*, provides a product that is designed to be scooped out of the container in appropriate portions. Hence, *Hillebrand* is not concerned with the structure of the present invention that allows a container to be inverted and dispensed into a dish maintaining its structural integrity.

When these references are combined with *Ohba*, one does not achieve the claimed invention. For example, all of the references fail to disclose or suggest the horizontally oriented claimed product.

Nor do the *QP Corp* references remedy the deficiencies set forth above. Each of these references is concerned with bread-spread compositions in a container. By definition the spreads would be removed in small, discrete quantities. Thus, the issues that are faced by the claimed invention in providing a complete meal that can be attractively dispensed in its entirety from a can are not a concern with these references. Neither of these references are concerned with how the product is dispensed from the container but, rather the concern is with putting them in an attractive position within the container.

With respect to *QP Corp* ('677), it should be noted that the viscosity of the components are 10-100 times greater than the components of the claimed invention. Thus, this product is not

capable of being withdrawn from the container except by scooping small portions out with a suitable utensil. By contrast, the claimed invention can be dispensed from the container by inversion.

With respect to *Errass*, this reference relates to a product, specifically a condiment, that is dispensed from a tube. Nothing is disclosed in *Errass* with respect to horizontal layering.

The *Henkel* reference relates to a cosmetic, not a food. Applicants respectfully submit that this reference would not even be considered by one skilled in the art. Regardless, the reference does not disclose horizontally disposed layers. Therefore, *Henkel* does not remedy the deficiencies noted above.

The citation in the most recent Office Action to six additional references does not remedy the deficiencies set forth above.

Waldburger discloses a container having a removable cover. Food is placed within the container in an inverted position and frozen. When the food is to be heated, the cover is removed and the container is inverted onto an ovenable plate. The plate and container are brought to a temperature suitable for eating. The container is then removed from the plate, leaving the food in a position suitable for serving.

However, *Waldburger* does not teach or suggest a canned pet food product. In addition, *Waldburger* does not disclose chunks in a gravy layer. The reference only discloses a solid, single piece of steak and a gravy.

The invention in *Waldburger* is designed to increase the efficiency of meal preparation using separate containers for different meal components. This teaches away from the present invention which provides a complete meal in one container, as recommended when serving pets.

McGonigle discloses an apparatus which holds food to be heated in an oven. The apparatus consists of a compartmentalized lid which is inverted over a reusable dish and placed in an oven for heating. Foods placed in the lid are placed in an inverted manner. After the food is heated, the apparatus is inverted for serving.

However, nowhere in the specification does *McGonigle* teach a pet food upper layer which is capable of supporting a pet food base layer when the pet food is inverted. *McGonigle*, in Column 3, lines 52-54, mentions that sauces that are intended to cover an entrée are placed in the lid first. There is no mention, however, of the entrée being able to support the sauce when inverted. Moreover, *McGonigle* teaches the separation of meal components into separate compartments when preparing the meal. Again, this clearly teaches away from the present invention.

Cease discloses a holder which receives frozen foods in an inverted manner. The holder is inverted on a service plate. *Cease* does not mention a canned product. Nor does *Cease* mention filling a meal into a single compartment. *Cease* also does not describe a gravy containing chunks.

Bliley discloses a method for preparing a frozen food package. A sauce is placed in a container and frozen. Another food, such as spaghetti, is placed in the same container and the container is again frozen. Upon serving, the container is inverted. While *Bliley* mentions a base layer and an upper layer, *Bliley* does not mention an upper layer that is specifically directed to provide support to a base layer when inverted for serving. Indeed, the upper layer does not support the base layer upon inversion.

Stover discloses an ice cream package. The present invention, in contrast, is a pet food. Applicants respectfully submit that this reference would not even be considered by one skilled in the art.

Rogers teaches a food product having a gravy mixture including gelatin. The gravy mixture is placed in a container. A meat product is placed on top of the gravy mixture.

Rogers, by the Patent Office's own admission, does not teach inversion of the food product when serving the food product. *Rogers* teaches support of the meat by the gravy; however, *Rogers* does not teach the converse. *Rogers* also does not teach a canned food product directed to pets.

Moreover, the present invention discloses an upper layer of solid food stuff as well as a base layer having solid food pieces in a gravy. *Rogers* only teaches a single meat product which may disintegrate into chunks.

Applicants note for the record that not only does the prior art, if combinable, not suggest the claimed invention but there is no motivation to combine the cited references with *Ohba* to arrive at Applicants' invention. Indeed, the sheer number of references, sixteen, suggest that the rejection is a mere hindsight reconstruction of the claimed invention. If it takes sixteen separate references to piece together the claimed invention, then it must be non-obvious.

In conclusion, Applicants respectfully submit that the obviousness rejection is based on an improper application of the law to the facts. For example, with respect to independent Claim 1, none of the cited references, either alone, or in combination, suggest the property of support on inversion of the base layer in the can. This is a specific limitation of Claim 1 that is not disclosed nor suggested by any of the sixteen references.

The principal reference, *Ohba*, merely teaches layers but does not contemplate including chunks of food in a fluid as one of the layers. Indeed, *Ohba* teaches that the layers should be of a similar kind of texture and structure to provide versatility/reversibility in order of eating. The remaining references do not remedy the deficiencies of *Ohba*. Specifically, the structures of the food products in the remaining references teach away from reversibility in the order of eating, clearly eliminating any motivation to combine these references. With respect to the claims that depend from independent Claim 1, these claims add additional features that Applicants submit are neither disclosed nor suggested by the prior art in combination with the elements of Claim 1.

With respect to method Claim 10, Applicants respectfully submit that clearly the cited references fail to disclose or suggest the claimed method. Not one of the references suggests the claimed order of filing a can. Indeed, the references fail to disclose or suggest that the order of filling the can is important in order to obtain the desired structure on emptying out the contents of the can.

For the foregoing reasons Applicants respectfully request reconsideration of their patent application and earnestly solicit an early allowance of same.

Respectfully submitted,



(Reg. No. 30,142)

Robert M. Barrett
BELL, BOYD & LLOYD LLC
P.O. Box 1135
Chicago, Illinois 60690-1135
Tel: (312) 807-4204
ATTORNEY FOR APPLICANTS